United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-7125

TO BE ARGUED BY
CHARLES TRYNIN

77-7125/7126

UNITED STATES COURT OF APPEALS
For The Second Circuit
No. 77-7125/7126

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P/S
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DOROTHY L. COLE, LOIS H. ZISOOK, HARRY W. VOEGE and ANNA MAY TUNMORE, as Trustees, SAMUEL GREENFIELD FUND, INC., and HAROLD STILLER and MILDRED STILLER, as joint tenants,

Plaintiffs,

HARRY W. VOEGE and ANNA MAY TUNMORE, as Trustees,

Plaintiffs-Appellants,

v.

SCHENLEY INDUSTRIES, INC., GLEN ALDEN CORPORATION, RAPID-AMERICAN CORPORATION, ISIDORE A. BECKER, BERNARD GOLDBERG, PAUL A. JOHNSTON, DAVID A. CHERNOW, WALTER O. HEINZE, HOWARD FELDMAN, MILO B. HOPKINS, RUSSELL G. SMITH, ALBERT N. GREENFIELD, MISHULAM RIKLIS, GLEN ALDEN SUBSIDIARY, INC., P. J. CLIFFORD, W. P. JOHNSON, S. KITTAY, M. L. MENDELL, L. C. LANE, G. H. PERKINS, and B. DENMARK,

Defendants-Appellees.

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SECOND CIRCUIT

(On Appeal from the United States District Court for the Southern District of New York)

BRIEF OF PLAINTIFFS-APPELLANTS
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as Trustees

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BRIEF OF PLAINTIFFS-APPELLANTS HARRY W. VOEGE and ANNA MAY TUNMORE, as Trustees

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BRIEF OF PLAINTIFFS-APPELLANTS HARRY W. VOEGE
and ANNA MAY TUNMORE, as Trustees

Preliminary Statement

This is an appeal by consolidated plaintiffs, Harry W. Voege and Anna May Tunmore, as Trustees (the "Voege plaintiffs"), common stockholders of Schenley Industries, Inc. ("Schenley") on March 20, 1968, August 8, 1968, February 24, 1971 and June 17, 1971, from a judgment dated February 2, 1977 of the United States District Court for the Southern District of New York (Owen, J.) entered February 3, 1977, after trial before the Court, sitting without a Jury, of the issue of liability.

Under date of November 24, 1976, Judge Owen filed his opinion (CCH Federal Securities Law Reporter, Current Volume, Par. 95,765) constituting the Court's findings of fact and conclusions of law, wherein he ruled that Count 1 of the Consolidated Amended Complaint is dismissed for failure of proof; that Count 2 thereof was withdrawn upon the trial; that Counts 4 and 5 thereof were not pursued upon the trial and are dismissed; and that Count 3 thereof is dismissed upon the law and the facts. This opinion is not otherwise reported.

The judgment entered on February 3, 1977 (dated February 2, 1977) was in favor of the defendants, dismissing the Consolidated Amended Complaint, on the merits, with costs.

Said Count 3 incorporated the allegations of the complaint in Voege v. Smith (71 Civ. 1042, the "Voege action") which alleged a class action on behalf of the common stockholders of Schenley and which was consolidated into the above captioned action.

The Issues Presented for Review

The trial of the consolidated action was conducted by Herman Odell, Esq. (the attorney for plaintiffs Cole and Zisook, preferred shareholders of Schenley) as lead counsel, and was attended by the Voege plaintiffs' attorney, whose appearance thereat was duly noted.

Judge Owen granted express permission to the Voege plaintiffs' attorney to submit a post-trial memorandum in support of the Schenley common stockholders' third party beneficiary claim for relief (alleged in Count 3 of the Consolidated Amended Complaint and in the Voege action complaint) plus such other aspects of the (common stockholders') case that they wished to comment upon (TT A698 p.598).(1)

(1)"TT" = Trial Transcript.

The issues presented for review listed below are limited to those that were embraced by the claims so advanced by the Voege plaintiffs, to wit:

1. Was the Trial Court in error in failing completely to make findings and conclusions as to the claims advanced in behalf of the Schenley minority common stockholders that:

(a) the 1971 merger agreement provisions that the minority-held 14% of the common stock of Schenley (a Delaware corporation formed in 1933) would be converted into cash and redeemable Glen Alden Debentures, upon the consummation of the long-form merger of Glen Alden Subsidiary, Inc. (a Delaware paper corporation 100%-owned by Glen Alden, the 86% common stockholder of Schenley) into and with Schenley, as the surviving corporation, were null and void and ineffective, under Delaware law, to effect such conversion; and that

(b) the defendants violated Rules 10b-5 and 14 of the 1934 Act by inducing the Schenley minority stockholders to endorse and surrender their Schenley common stock certificates in exchange for cash and redeemable Glen Alden Debentures (i) by false representations that upon the consummation of the merger they were required to do so as a matter of law, and (ii) by failing to reveal

that such stockholders were not legally obligated to make such exchange, thereby luring and enticing these minority Schenley common stockholders into unwittingly accepting a concealed and disguised exchange offer?

2. Was the Trial Court in error in finding that the third party beneficiary claims of the Schenley minority common stockholders to a merger offer price of not less than was paid to Rosenstiel in 1968 for his Schenley common stock were not still viable at the time of the merger over three years later because, as the Trial Court found, "obviously" no shareholder had a vested right to the same consideration as Mr. Rosenstiel ad infinitum, and because of the Trial Court's finding that, since the Rosenstiel sale, Buckingham was sold and there have been other substantial changes in the business affairs of Schenley?

3. Are the Voege plaintiffs entitled to a declaration that the application of amended §251, D.C.L. to this merger violates the constitutionally protected contract and vested property rights of Schenley's common stockholders?

4. Are the Voege plaintiffs entitled to an award of counsel fees for the $8,000,000 of benefits derived by Schenley's minority stockholders from the filing of their complaint and motion for temporary injunction in March 1971?

STATEMENT OF THE CASE

A. Nature of the Case

At all times herein involved, Schenley was in the primary business of manufacturing, importing and selling distilled spirits, with approximately 8,000,000 shares of common stock listed and traded on the New York Stock Exchange. Its principal Scotch brands were Dewars and Cutty Sark. Cutty Sark was distributed until May 1971 through the Buckingham Corporation ("Buckingham"), 52.66%-owned by Schenley until December 1969, and 100%-owned until May 1971 when it was sold pursuant to a decree in an anti-trust action filed in 1966. (A950, UF 1, 4, 12, A110, 110.1)

In March 1968, Glen Alden Corporation ("Glen Alden"), pursuant to a Stock Purchase Agreement dated March 20, 1968 (the "Stock Purchase Agreement"), purchased 18% of Schenley's common stock from Lewis S. Rosenstiel ("Rosenstiel"), the founder and chairman of the board of Schenley, at the above-market price of $53.33-1/3 per share, paid in cash in an arm's length transaction negotiated by Meshulam Riklis, Glen Alden's chief executive and controlling stockholder, (A187(9) Prior and subsequent thereto, Glen Alden and Schenley were not engaged in similar business activities. (A1172)

On or about February 25, 1971, it was publicly announced that Schenley had approved a plan under which it would become a wholly-owned subsidiary of Glen Alden, which, by that time, owned 86% of Schenley's 7,991,777 then outstanding shares of common stock, and that under the plan Schenley common stockholders (other than Glen Alden) would receive $5 in cash and $30 principal amount of 7½% 15 year Glen Alden Debentures (A1339) (valued in the aggregate by the Voege plaintiffs at $26.60 per share (A063)). The plan called for Glen Alden to accomplish this by merging "a new subsidiary" of Glen Alden into Schenley. It was announced that the Schenley-Glen Alden transaction was subject to the execution of a definitive agreement and to approval of Schenley shareholders at a stockholders' meeting. (A1339)

The Voege action against Schenley, Glen Alden and the defendant directors of these corporations was brought on March 8, 1971, upon the basis of this press release, to procure an injunction against the proposed merger or rescission thereof and/or damages, as well as a judgment declaring the plan to be null and void, cancelled and rescinded.

A054/5, pars. 49/50

The complaint alleged (paragraph 11) that by virtue of the Stock Purchase Agreement, the class became third party beneficiaries of Glen Alden's contractual obligation to make an offer to purchase their shares of

Schenley common at not less than $53.33-1/3 per share, and that there was no adverse change in the business affairs of Schenley since 1968 that justified or required a lesser price.

The complaint also alleged that the plan was not authorized under Delaware law.

Unfairness, fraud and breach of fiduciary duties were also alleged (paragraphs 25 and 26), as well as violation of §10(b) and Rule 10b-5 of the Securities Exchange Act of 1934 (the "1934 Act"). (A066)

This complaint, as realleged and incorporated in the Consolidated Amended Complaint, was amended to also include (in paragraph 65) a charge of merger proxy statement violation, and the Consolidated Amended Complaint also alleged (in pars. 26, 27 and 40) the invalidity of the merger under Delaware law, charging that, in legal effect, the alleged merger was "nothing more than a tender offer" and that the merger proxy statement erroneously described the nature and binding effect of the purported merger.

B. Course of Proceedings and Disposition Below

The Voege plaintiffs also served a notice of motion and supporting brief for a preliminary injunction of the proposed merger, returnable in March 1971, prior to the issuance of the merger proxy statement. (A009)

The moving papers urged that in the Sanders-Riklis litigation brought by a Glen Alden stockholder in 1968 to enjoin Glen Alden's proposed exchange offer for all the Schenley common shares at $58.66-2/3 per share, which was above the market and more than was paid Rosenstiel, as a waste of Glen Alden's assets, Glen Alden submitted the Greenberg affidavit of May 1968,[1] prepared in its behalf by investment bankers Bear Stearns & Co., to justify the $58.66-2/3 price as a prudent investment valuation, and that by procuring judicial denial of the injunction application, Glen Alden was judicially and collaterally estopped to evaluate Schenley shares in 1971 on the basis of other criteria.

It was also urged that application of the appraisal yardsticks used by Greenberg in 1968 to the vital financial facts and figures as to Schenley's condition in 1971, indicated that there was no change in Schenley's business affairs since 1968 that justified or required a lower merger price, in violation of Glen Alden's obligations to the

(1) Trial Exhibit ("T.Ex.") 6. A1311, UF17, A1107.

Schenley common shareholders as third party beneficiaries of the Glen Alden-Rosenstiel March 1968 Stock Purchase Agreement.

The Greenberg affidavit stated that in determining the (1968) value of Schenley common, consideration was given to the most widely used determinant of value, the price-earnings ratio, as well as the "less meaningful determinant", the price-book value ratio. (A 1319)

It established Schenley's earnings for the 12 months ended February 29, 1968 at $4.12 per pre-split share ($2.76 per split share) and concluded that on the basis of a comparison of price-earnings ratios from 1963 to 1968 of several leading companies in the liquor industry and special factors in the Schenley situation, that a higher-than-average multiple of 20 times earnings (or $55.52 per split share) for Schenley common was warranted and fair. (A 1319/20)

It established Schenley's 1968 book value at $54.60 per pre-split share ($36.40 per split share) and concluded that on a comparison of price-book value ratios of other leading liquor industry companies, a ratio of 1.5 times Schenley's book value (or $54.60 per split share) was a fair price. (A 1321)

It minimized the factor of market price for the

stock of Schenley's majority-owned subsidiaries (Buckingham and Seager-Evans & Co.) on the ground that, in the judgment of Bear Stearns & Co., the market prices of these subsidiaries are "affected by the fact that only a minority interest is in public hands". (A1318)

The Voege plaintiffs also submitted the March 24, 1971 affidavit of their expert, John H. G. Pell (A011). Using the same techniques as did Mr. Greenberg in 1968 but using the 1971 primary earnings of Schenley at $3.01 per common share, the 1971 book value at $35.48 per common share, the average 1971 price-earnings ratio of approximately 18 times earnings, and the average 1971 price-book value rate of approximately 1.7 times book value, Mr. Pell established the basis for a 1971 value of at least, if not more than, $54 per common Schenley share. Mr. Pell also established the value of the proposed offer at $26.60 per share.

Defendants obtained a stay of all proceedings, including the injunction motion, pending disposition of a consolidation motion made before Judge Motley. The injunction motion, which had been assigned to Judge Edelstein, was then assigned to Judge Motley. (A009)

Despite this stay, defendants secretly proceeded to move the merger forward, including the retention of Allen & Co. as the investment banker to evaluate the merger, and Mr. Schuman of Allen & Co. spent the month of

May 1971 (unbeknownst to the Voege plaintiffs) in preparing the Schuman affidavit.

On or about May 21, 1971, Schenley, without prior notice or press release, mailed out a proxy statement and notice of stockholders' meeting to be held June 17, 1971 to approve the May 21, 1971 merger agreement, annexed to the Proxy Statement (T.Ex. 1). A948

By order to show cause served June 3, 1971 and returnable June 8, 1971 before Judge Lasker, the Voege plaintiffs moved to vacate the stay to the extent of permitting the plaintiffs to apply, pursuant to F.R.C.P. Rule 65(5), for a stay of the effectuation of the merger agreement until the hearing and determination of plaintiffs' injunction motion, originally returnable March 25, 1971, and then assigned to and lodged with Judge Motley. (A009)

The basis for this application is the long line of cases which hold that where one party is stayed from proceeding in a litigation, the other party is implicitly stayed, during the period of the first party's restraint, from altering the status quo and rendering moot the subject and object of the litigation.

At the motion calendar call on June 8, 1971 before Judge Lasker, counsel for the Voege plaintiffs was served with a copy of the June 7th affidavit of William J. Manning,

(A009)
Esq., counsel for Schenley, which stated, among other things, that:

> " Defendants have no objection to a vacatur of the stay which will permit the plaintiffs to assert their claim that the reorganization should be enjoined. However, defendants do object to any restraining order which would delay the consummation of the reorganization pending the determination of the preliminary injunction motion. Accordingly, defendants have submitted herewith their papers in opposition to plaintiffs' motion for a preliminary injunction, and respectfully request the Court to lift the stay and hear argument on plaintiffs' motion for preliminary injunction. "

Plaintiffs' counsel was then served in the Courtroom with the voluminous Schuman affidavit[1] and voluminous briefs that had obviously required weeks to prepare.

Plaintiffs' counsel never had an opportunity to read or to answer the Schuman affidavit (28 pages plus 47 pages of statistical and other exhibits) and the defendants' 23-page memorandum of law before the argument, although Rule 9 of the General Rules requires service of answering papers at least 3 days before the return date. Here, the papers were received minutes before the argument, and were unread at the time of the argument.

Plaintiffs, having come to Court prepared to argue a motion to lift the stay, were not and could not be pre-

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(1) T.Ex. 49. A 1475 et seq.

pared to respond to the Schuman affidavit or to argue the merits of the injunction motion for which the defendants were secretly preparing for weeks.

The Schuman affidavit, prepared defensively to the injunction motion, was an interested "brief" for the defendants.

Mr. Schuman, in paragraph 3, detailed the prior relationship of Allen & Co. with Glen Alden (A147a). He did not disclose that approval of the merger terms by Allen & Co. was furnished ex post facto after the self-dealing officers and directors of Glen Alden had agreed on the basic terms of the merger.

As stated by Vice Chancellor Marvel in Greene v. Schenley (D. Ch. 1971, 281 A.2d 30, at 33) with respect to an identical Schuman affidavit presented to that Court in opposition to an attack there on the merger here involved:

> "...I am satisfied that the self-dealing officers and directors of Glen Alden agreed on the basic terms of the reorganization plan here under attack, and that the approval of Allen & Company, Incorporated was furnished as it were ex post facto, and because of close business relations between such bankers and those in control of Schenley such analysis cannot be deemed to be in any degree impartial. Compare Bastian v Bournes, Inc. (Del. Ch.) 256 A.2d 680, aff'd (Del. Supr. Ct.) 278 A.2d 467. "
>
> (Emphasis supplied.)

In paragraph 4 of Mr. Schuman's affidavit, he

states that in reaching the conclusion (that $29 per Schenley common share was a fair and reasonable merger price), he studied the public financial information as well as non-public information supplied by Schenley relevant to Schenley's operations and information relating to the liquor industry and Schenley's relative position in that industry, including data supplied by Schenley with respect to trends in consumption of various types of liquors and as to relative brand strengths within the industry. (A1477)

Members of Schenley's management also discussed with him various non-public matters with respect to Schenley's sales, inventory and accounting practices. It does not appear that they supplied him with their estimates and projections of future prospects and the data supporting the same. (A1477/8)

It appears that none of the additional (adverse) non-public material was publicly disclosed in either the 1968 Exchange Offer Prospectus (T.Ex. 3) A1172 or the 1971 Merger Proxy Statement (T.Ex. 1) A948.

This non-public material was accepted by Mr. Schuman unquestioningly, and he states in his affidavit that "I did not make any independent factual investigation of the accuracy of this material." (A1478)

It is reasonable to assume, and it is an inescap-

able inference, that Schenley would and did supply only such non-public information as would support the merger terms, in line with the "tendency of management to view its obligation to the parent and its stockholders as primary, and to regard the subsidiary's public stockholders as outsiders, the value on the subsidiary's assets will often be as low as reasonable pessimism will allow."(1)

Estimates, forecasts and other data establishing that the new Schenley management had effected a definitive turn-around for Schenley and that its prospective earnings for the balance of 1971 and for 1972, 1973 and 1974 without Buckingham would (and did) approximate $27,000,000 per year, exceeding Schenley's 1968 earnings with Buckingham, (p. 11, Cole Brief 77-7126) were apparently withheld from and not considered by Mr. Schuman.

This non-public adverse material dealt with Schenley's alleged Fifo inventory accounting and the effect thereof (A1490), the alleged ephemeral license to distribute Dewars (renewed every three years for numberless years (A1491)), the alleged unfavorable product mix (A1491/2), the alleged unacceptance of brands (A1493), and the alleged overoptimism of management in its prospects for liquidating Schenley's excess inventory (A1501) (which were not disclosed in or which were contrary to the representations of the Exchange Offer Prospectus and the

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(1) Tanzer v. Haynie (S.D.N.Y. 1976) 405 F.Supp. 650.

Merger Proxy Statement). Mr. Schuman concluded at page 15 (A1489) of his affidavit that "continued growth of earnings (above 1970) of any significant magnitude...would appear unlikely", and (p. 23) that he did not "believe it reasonable to conclude that Schenley's past poor growth record will markedly improve in the future". (A1497)

Schuman rejected the Greenberg view that the price-earnings ratio and price-book value ratio of comparable leading liquor industry companies were the principal value determinants (A1488, A1497) and rejected the Greenberg view that the market price of a majority-owned company is adversely affected by the fact that "only a minority interest is in the public hands". (A1483)

Schuman then advanced the view that these alleged adverse factors required a valuation of Schenley at 13 times Schenley's earnings as adjusted for the sale of Buckingham (sold in May 1971 for $120,000,000) (A1487). Also, in line with his pessimistic view as to the continued growth of Schenley's earnings, he took 1970 as Schenley's most representative year. (A1486)

Mr. Schuman then proceeded to evaluate Schenley (1971), without Buckingham, on the basis of Schenley's 1970 net income of $27,183,000 (Exhibit 8 (A1503) to Schuman affidavit), from which he deducted Buckingham's 1970 after-tax income of $8,710,000 to arrive at projected 1971 income of

$18,473,000 for Schenley without Buckingham, before consideration of the use the $114,000,000 after-tax proceeds of the Buckingham sale could be put to.

Mr. Schuman then made the assumption (contrary to the actual facts) that these proceeds would be applied to reduce Schenley's short term debt, which would result, by commensurate adjustment in interest expense and related estimated income tax, to an increase in Schenley's adjusted income, without Buckingham, by $4,076,000 to $22,543,000, or (on a diluted basis) $2.18 per share. Using a p/e ratio of 13x, he argued that the result, $28.34 per share for Schenley, as adjusted for the sale of Buckingham, justified the $29 per share merger price (the package price as evaluated by him) which he claimed is also in line with Schenley's historical market prices (Schuman affidavit, pars. 14 to 16). (A 1483)

As will be demonstrated below, Schuman erred in his consideration of Schenley's prospects and future earnings without Buckingham (approximately $27,000,000 annually for 1971, 1972 and 1973), which made 1970 an unrepresentative year to use, and 13 times earnings, an inappropriate figure for a company with a growth rate of 50% in a matter of months after the Buckingham sale.

Also, the contrary-to-fact assumption that the Buckingham proceeds would be used to reduce Schenley debt

was inappropriate in view of the fact that these proceeds were actually usable for payment to Schenley stockholders. (In fact, they all were paid to one stockholder, Glen Alden, in a self-dealing transaction, in disregard of its fiduciary obligations.)

Plaintiffs have dwelt at length with what happened before Judge Lasker because Judge Lasker's opinion on the injunction motion was erroneously adopted by Judge Owen as virtually the law of the case, in complete disregard of the 145-page post-trial memorandum supplied by the Voege plaintiffs and the record facts in the case. (Judge Owen erroneously struck the post-1971 financial statements of Schenley which would show the $27,000,000 annual earnings without Buckingham (p. 11, Cole Brief 77-7126) and erroneously limited the testimony, all of which would refute Mr. Schuman's evaluation of Schenley's prospective earnings as well as his use of a 13xp/e ratio.)

Judge Lasker's Opinion

On June 14, 1971, Judge Lasker denied the application for temporary injunction (329 F.Supp. 180), holding that plaintiffs had not made the showing of probable success and possible irreparable injury to the degree required for injunction-granting purposes. The opinion states that:

" The agreement of March 20, 1968 provided that it was 'the intention

> of the parties' that the holders of Schenley common would be afforded an opportunity to sell their shares for a total consideration comparable or more favorable than the purchase price paid to the Rosensteil group. (Complaint paragraph 10.) Plaintiffs' claim that by virtue of the stock purchase agreement of March 1968, they became third-party beneficiaries of Glen Alden's obligation and are now entitled to $54 per share rather than the $26.60 per share which is their valuation of the 'package' they would receive under the Plan. "

(The Stock Purchase Agreement provisions are broader than a mere statement of "intention" and include Glen Alden's agreement

> "...to make or cause to be made, an offer to purchase all other outstanding shares of Schenley common stock from the holders thereof on terms not less favorable than the terms of a proposed offer set forth in the Stock Purchase Agreement. "

This proposed offer, which was to be made within a reasonable time, was valued by Glen Alden at $53.33 per share.)

The opinion continues:

> " By prospectus of August 8, 1968 (clearly designed to carry out the 'intention' clause of the March agreement), Glen Alden offered to purchase the stock of the holders of Schenley common at a formula which produced approximately $53.10 per share. "

(Here, Judge Lasker confused the offer in the Exchange Offer of August 8, 1968 ($58.66-2/3) with the offer proposed in the Stock Purchase Agreement ($53.33-1/3).

The opinion states further that:

> " Plaintiffs and the class they represent declined to tender their stock; that is, they refused the offer made by Glen Alden

> in August, 1968. They claim, nevertheless, that by virtue of the March, 1968 agreement they have a continuing 'vested right' as third party beneficiaries of the March, 1968 agreement to receive $53 to $54 at the present time. "

(The gravamen of the Voege complaint was that the Schenley common stockholders had a vested right to receive such an offer within a "reasonable time" after March 1968. They made no claim to such right ad infinitum. As will be demonstrated below, the merger offer was made within a reasonable time, as the final step in a three-step integrated unitary plan to acquire 100% of Schenley. This final step was deferred, for Glen Alden's convenience, until Glen Alden acquired 100% of Buckingham in December 1969, and then sold Buckingham for $120,000,000 in May 1971, so that the Schenley minority could be eliminated by the use of Schenley's cash. The record establishes that the August 1968 tender offer was undertaken with the intent to subsequently merge, and that 3 years, under the circumstances, was within a "reasonable time".)[1]

The opinion states further that:

> " As a subordinate argument, plaintiffs contend that Glen Alden is estopped from contending that a lesser price per share is fair, because, in connection with the August 1968 tender offer, stockholders of Glen Alden sought to enjoin the offer on

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[1] See: Brudney and Chirelstein, "Fair Shares in Corporate Mergers and Takeovers", 88 Harvard Law Review, 297 (hereinafter "Brudney"), at n. 87, p. 340.

> the ground that it was a waste of Glen Alden's assets, and Glen Alden asserted in that litigation that the price of $53.33-1/3 per common share was fair and reasonable. This argument may be disposed of summarily since, while Glen Alden might be estopped on a showing that the present factual situation is substantially identical to that which existed in 1968, no such showing has been made (other than a conclusory allegation in the complaint), and it is highly doubtful that such a showing can be made. "

(Here, Judge Lasker swallowed the Schuman affidavit, with no opportunity of refutation and cross-examination by plaintiffs. Implicit in his opinion was the expectation that, at the trial, plaintiffs would have the opportunity to show that the 1971 factual situation (Schenley without Buckingham) is substantially identical to that which existed in 1968.)

The opinion, in describing the 10b-5 claims, states:

> " The Glen Alden prospectus of August 8, 1968 contained the following paragraph:
>
> 'After completion of the Exchange Offer, Glen Alden may (subject to future conditions) make a further tender offer to the remaining holders of Schenley Common Stock or propose to combine Glen Alden and Schenley. In connection with any such further tender offer or combination, the consideration to be received by the holders of Schenley Common Stock who have not accepted the Exchange Offer may be more than, less than, or the same as that provided in the Exchange Offer.'
>
> It is claimed that the prospectus falls awry of the requirements of Section 10(b) since neither in this passage or elsewhere did the prospectus 'disclose what future conditions would prompt or justify a lesser

consideration than that provided in the said Exchange Offer, in view of Glen Alden's obligations under the Rosensteil Stock Purchase Agreement, and in view of the vested third party beneficiary interest therein of plaintiffs and the other members of the class'. "

(Plaintiffs' claim is that the parenthetical reference to "subject to future conditions" must be read into the second sentence of the paragraph quoted from the Prospectus, and that thereference to the Exchange Offer consideration is to $58.66-2/3, which is not to be confused with the terms of the proposed offer set forth in the Stock Purchase Agreement ($53.33-1/3) of which the stockholders were advised on the next page in the Exchange Offer.

Accordingly, plaintiffs here submit that the second sentence of the paragraph quoted by Judge Lasker from page 7 of the Exchange Offer Prospectus must be construed to read:

" In connection with any such further tender offer or combination, the consideration to be received by the holders of Schenley Common Stock who have not accepted the Exchange Offer may (subject to future conditions) be more than, less than, or the same as that provided in the Exchange Offer (but not less favorable than the terms of the proposed offer set forth in the Stock Purchase Agreement). ")

(The matter in parenthesis and underscored is interpolated.)

Under the heading of "Probability of Success", the opinion states, with respect to plaintiffs' contention:

" Their theory that they are entitled to $53 to $54 per share as a third party beneficiary is of doubtful validity, since the Rosensteil-Glen Alden agreement of March,

> 1968 merely stated that it was the intention of those parties that the holders of Schenley common would be afforded an opportunity to sell their shares at a comparable or more favorable price than the $53.33-1/3 paid Rosensteil (emphasis added). Such an opportunity was tendered the plaintiffs in August, 1968 and they rejected it. "

(Here again, Judge Lasker misconstrued, by oversimplification, Glen Alden's obligations which were not limited to a pious statement of mere intention to make a tender offer, but included the specific agreement to make, within a reasonable time, an "offer to purchase" all other outstanding shares of Schenley common on terms not less favorable than $53.33-1/3 per share. Basic to plaintiffs' case is the proposition that in a takeover situation, where the takeover party is seeking to acquire 100% of the target company by a three-step integrated transaction consisting of a block purchase from a major stockholder, tender offer, and subsequent controlled merger, the agreement with the major stockholder, who is required to assist in the endeavor, that the takeover party will make an "offer to purchase all other outstanding shares" at not less than a specified price, embraces both the tender offer and the merger which is the intended result of the acquisition of controlling stock on the tender offer.)

Continuing, the opinion states:

> " Furthermore, the very offer of August, 1968 advised all holders of Schenley common (including plaintiffs) that if any further offer were made it might be at a price 'more

than, less than, or the same as provided on that occasion $53.10). (Emphasis added.) "

(This is the same error by Judge Lasker, but made on a crucial matter. As demonstrated, the Exchange Offer Prospectus warned that the merger price might be lower than the Exchange Offer price of $58.66-2/3. There was no warning, to those who held their shares, that they may be eliminated by a freeze-out merger at less than $53.33-1/3 per common share.)

Finally, the opinion states:

" The prices paid to Rosensteil and offered to holders of Schenley common in August of 1968 are, if not irrelevant, clearly not controlling...since...there have been substantial changes in the business affairs of Schenley since those days, including the sale, under an antitrust decree, of one of Schenley's most profitable subsidiaries. "

(Plaintiffs were deprived both on the motion and at the trial from demonstrating that despite this sale, Schenley without Buckingham in 1971 had higher earnings and a greater book value than did Schenley in 1968 with Buckingham.)

The opinion concluded that plaintiffs could not be irreparably damaged since they have rights of appraisal and since their right to litigate the issue remains, wherein they can be fully protected by "recovering from defendants whatever damages they may be entitled to".

On July 1, 1971, Judge Lasker denied reargument on the ground that the record made at that time by plaintiffs

was insufficient to support their assertion that the present factual situation is substantially identical to that which existed in 1968 or 1969, that plaintiffs have not established irreparability of damages, and that it was impossible for the Court to enjoin a merger which by that time had been consummated.

Subsequent to the disposition of these motions, consolidation was granted, Mr. Odell, the attorney for preferred stockholders, was designated as lead counsel, and pretrial discovery was had, including the designation of the action as a class action and the giving of notice to the class.

The case was tried before Judge Owen, without a Jury, on October 14, 15, 16, 17, 28, 29 and 30, 1975.

Judge Owen's Opinion

Judge Owen's opinion, containing findings of fact and conclusions of law, filed November 24, 1976, made the dispositions described above at page 1 hereof.

With respect to the common stockholders' claims, Judge Owen ruled:

> " A final minor attack herein is as follows: by an agreement in March, 1968, Glen Alden acquired certain shares of Schenley common stock from Lewis N. Rosensteil and others. The purchase price was $53.33-1/3 per share in an

> arm's length transaction. In order to avoid possible future litigation, arguably involving the claim that this was a sale solely for control by insiders, the agreement also provided that it was the intention of the parties that the other holders of Schenley common would be afforded an opportunity to sell their shares for a total consideration comparable to or more favorable than that paid to the Rosensteil group. Certain plaintiffs herein contend that this established a third party beneficiary claim on behalf of all other stockholders which was still viable at the time of the merger over three years later. Judge Lasker, presented with the same facts, denied a preliminary injunction, pointing out that whatever validity the plaintiffs' arguments might have had at an earlier time, with the passage of time there had been 'substantial changes in the business affairs of Schenley since those days'. Obviously, no shareholder had a vested right to the same consideration as Mr. Rosensteil ad infinitum. Nothing new has been presented to me to cause me to view this matter differently. Since the Rosensteil sale, Buckingham was sold and there have been other substantial changes in the business affairs of Schenley. "

Judge Owen here adopted Judge Lasker's opinion in making the finding that "there have been other substantial changes in the business affairs of Schenley". This finding is based on erroneous record whereby relevant and material examinations of witnesses and introduction of documentary exhibits, relevant to the issue of Schenley's value in 1971 after the Buckingham sale, were wrongfully circumscribed and excluded. No findings at all with respect to the issues here presented as "1(a)" and "1(b)" at page 3, supra, were made, to plaintiffs' prejudice.

STATEMENT OF FACTS[1]

Upon defeating the Sanders-Riklis injunction motion by the Greenberg affidavit, and mooting the Kahn-Rosenstiel litigation[2] by increasing the Exchange Offer price to $58-2/3 per common share, Glen Alden proceeded with its tender for all other common shares by its August 8, 1968 Exchange Prospectus offer of $58-2/3 per share. (A 110, UF 2)

This Prospectus (at p. 8) set forth Glen Alden's Stock Purchase Agreement obligation to offer $53-1/3 per common share to all shareholders, within a reasonable time, and that it may make a further tender or merger offer. (A 1172)

At page 7 thereof, it contained the statement with respect to such further merger offer which is set forth and construed at page 22, supra.

There was no disclosure of what future conditions would warrant a merger offer of less than $58-2/3 per share, the Exchange Offer price.

There was no warning that the merger, which would be effected by Glen Alden's vote, would offer less than $53-$54 per share, although the die was already cast, as Glen Alden's management well knew, when the Exchange Offer terms were fixed at more than $53-1/3. It was then a fore-

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[1] The facts here are stated in summary fashion. Details, where relevant, are referred to in the Argument, infra.

[2] 424 F.2d 161 (CA3, 1970)

gone conclusion that, for Glen Alden to achieve its intention, stated in the Stock Purchase Agreement, to acquire all the common for a total consideration comparable to $53-1/3 per share, it would have to, on the merger, reduce the $53-1/3 per share to the remaining shareholders by a pro rata share of the total "excess" over $53-1/3 per share paid on the Exchange Offer. At the close of the Exchange Offer, by which 5,359,400 common shares were acquired at a "premium" of approximately $29 million over $53-1/3 per share, there were left 1,100,000 untendered shares outstanding. It was then calculable that the merger price for those shares had to be not more than $26-$27 per share, for Glen Alden to realize its intention.

Rosenstiel, who had been paid a premium and who controlled Schenley's stockholders list and proxy machinery, was required to and did knowingly assist Glen Alden in making the Exchange Offer (T.Exs. 64 and 75). Rosenstiel and Riklis, experienced business and financial experts, knew, at the time, that Glen Alden could never get 100% of the stock by tenders at any price, and that a freeze-out merger would have to follow the tender. In substance, Mr. Riklis so testified (TT. pp. 126-132). A249-A255

With the completion of the tender, Glen Alden undertook to set the stage for the merger of Schenley.

The first step, completed in May 1969, was the

merger of Schenley's 52.66%-owned Buckingham subsidiary into BHM Industries, Inc. ("BHM"), another subsidiary of Schenley, whereby Schenley ended up with 52.66% of BHM and BHM had 100% of Buckingham.

The next step, completed on December 15, 1969, was the merger of BHM into Schenley, whereupon Schenley acquired 100% of Buckingham and the 42.34% of publicly-owned BHM shares were converted into Schenley's $1.40 preferred stock, then created. This preferred stock contained restrictions which precluded any merger of Schenley which did not give the preferred a stock interest in the survivor, prior to March 1971.

The final step was to find a buyer for Buckingham so as to raise the cash for the elimination of Schenley's minority by the use of Schenley's funds.

By November 1970, Schenley effected a Letter of Intent agreement of sale of Buckingham to Northwest Industries for $120,000,000, the definitive agreement to be subject to approval by the Department of Justice of the proposed purchaser. Such approval and the prospects of closing a final agreement of sale became a reality by February 1971.

Mr. Riklis, Glen Alden's board chairman, and Mr. Becker, Schenley's board chairman and a Riklis designee, then met to "set the merger terms" (TT. p. 132). A255

The only terms to be "set" by Messrs. Riklis and Becker were the exact price in the $26-$27 range, which range was a foregone conclusion as demonstrated above, and how this price was to be paid. The price set for the common was $5 in cash and a $30 principal amount of a 7½% 15-year Glen Alden Debenture (valued by plaintiffs' expert at 72% of face value). After tentative approval by both boards, subject to a definitive agreement and stockholder approval, public announcement of the terms was made on February 25, 1971.

The Voege action complaint, and motion for temporary injunction, was filed within a week thereof, charging as inadequate and unfair the $26.60 per share value of the offer (A063) as appraised by said plaintiffs' expert. Mr. Schuman of Allen & Co. was then called in to be the architect of the defense, and to come up with an ex post facto investment banker's approval and justification of this mathematically computed proposal. The Schuman Affidavit was the interested defense brief of Allen & Co.

Schuman proposed that the Debenture maturity be advanced to 14 years, an increase in the sinking fund, and that the Debentures be made acceptable at full principal amount as consideration on the exercise of Glen Alden warrants. (A1406)

By these defensive maneuvers, investment experts, including plaintiffs' expert, acknowledged the value of

the revised merger offer as $29 per share for the common (A 479 81) and $26.10 per share for the preferred, for a total increase in the fund to be paid to all minority and public stockholders who were to be frozen out by the merger of $8,000,000.

This increase in the fund resulted from the filing in March 1971 by the Voege plaintiffs of their complaint and temporary injunction motion herein, containing their [redacted] $26.60-per-share evaluation of the offer announced on February 25, 1971. (A 063) By this defensive maneuver, defendants sought to meet the charge of the inadequacy of the merger price, and at the argument before Judge Lasker, in opposition to the temporary injunction motion, they argued that the merger price was $29 per share, that this price was fair and adequate, and that plaintiffs' charge of inadequacy based on a $26.60 price was moot.

In May 1971, the Buckingham sale was consummated, the merger agreement was signed on May 21, 1971, and the Schuman Affidavit to be used at the June 8, 1971 hearing on the Voege plaintiffs' injunction motion was prepared.

The Merger Agreement

By the terms of the merger agreement[1], Glen Alden

[1] Exhibit B to the Merger Proxy Statement, T.Ex. 1. A948

Subsidiary, Inc. ("Subsidiary") was to be merged into Schenley, as the surviving corporation, and the 100 shares of no-par stock of Subsidiary were to be converted into 7,991,777 shares of Schenley's irredeemable common stock and 2,535,765 shares of Schenley's redeemable preferred stock. Glen Alden, the 100% owner of Subsidiary, on surrendering its 100 shares of Subsidiary, and upon its surrender for cancellation and retirement of its 6,887,089 shares of Schenley common, was to receive said Schenley common and preferred shares, as the sole stockholder of Subsidiary whose existence was terminated by the merger. The 14% (1,104,688 shares) of Schenley common held by the minority were to be converted into cash and Glen Alden redeemable Debentures at the rate of $5 in cash and $30 principal amount of Debentures per share, and the redeemable preferred stock was to be converted into cash and Glen Alden redeemable Debentures at the rate of $4.50 in cash and $27 principal amount of Debentures.

Since its organization, Subsidiary, "a wholly owned subsidiary of Glen Alden, formed solely for the purpose of the reorganization", had "not engaged in any business activities or entered into any transactions whatsoever, except such as are related to" "the Agreement of Merger and the performance of Subsidiary's obligation...thereunder". (T.Ex. 1, p. 2, par. 2.3 of Ex. A thereto.) A948

The Proxy Statement does not purport to set forth any business purpose of Schenley for the merger, or any purpose therefor other than as stated at page 3 thereof that:

> " 2. The proposed reorganization will result in Glen Alden becoming the owner of all of the equity securities of Schenley (except the Schenley Preference Stock) and will permit Glen Alden to transfer funds from Schenley to itself, including a substantial portion of the proceeds of the recent sale of Schenley's subsidiary ...('Buckingham'), subject only to applicable restrictions in Schenley's various loan agreements. " (See UF 12, A110.5)

This transfer of funds was to be accomplished by the means set forth at paragraph 1.3(b) of Exhibit A to the Proxy Statement.

As testified to by Mr. Riklis (TT. pp. 154, 166-167), approximately $114,000,000 in cash was so passed up from Schenley to Glen Alden. A277, A289/90

At the trial, Mr. Schuman's testimony tracked his affidavit and included his statement, which was the crux of his testimony, that "Schenley was a worse company with Buckingham sold and the cash in it than it was when it owned Buckingham". (TT. p. 704.) A784/5

This was not a true picture of the situation.

When Riklis bought into Schenley in March 1968, there was then pending a Department of Justice anti-trust

suit, filed in April 1966, to require Schenley to divest itself of its (53%) stock interest in Buckingham, under the Clayton Act (T.Ex. 3, p. 57). A1172

At that time, Riklis could not pragmatically have relied on Schenley's 53% of Buckingham as a continuing contribution (then 16%) to Schenley's earnings, by virtue of this action and the inevitable divestiture of Buckingham. (A 229130) Riklis bought, seeing the 53% of Buckingham as a potential liquidation (T.Ex. 2, p. 5) A1073 and the source of at least $60,000,000 in cash (A1272) -- his real objective for the Schenley acquisition (TT. pp. 111-112, T.Ex. 5) A 234|5) A1268 -- while, pending the inevitable sale, it would be a temporary source of earnings soon to be eliminated. He paid $53-1/3 (and more) per share for this tempting prospect.

Consequently, Schenley, in 1971, with actual proceeds of $120,000,000 from the realized liquidation of (100% of) Buckingham and $27,000,000 in annual earnings from its continuing operations (p.11, Cole Brief 77-7126) (whereby Riklis's fondest dreams were finally realized), was a <u>better</u> company than Schenley in 1968 with potential proceeds of $60,000,000 (A1272) from the inevitable divestiture of its (53%) interest in Buckingham and with not more than $19,400,000[1] in annual earnings from the same continuing operations.

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(1) Schenley's earnings, without 53% of Buckingham, were $18,011,000 (1966), $19,437,150 (1967) and $12,881,919 (1968)(T.Ex. 1, pp. 23 and 24). Also: p.11, Cole Brief 77-7126.

Point I

A. THE LONG-FORM MERGER OF GLEN ALDEN SUBSIDIARY, INC. (A DELAWARE PAPER CORPORATION, 100%-OWNED BY GLEN ALDEN, THE 86% COMMON STOCKHOLDER OF SCHENLEY) INTO AND WITH SCHENLEY (A DELAWARE CORPORATION FORMED IN 1933) AS THE SURVIVING CORPORATION, IS NULL AND VOID AND INEFFECTIVE, UNDER DELAWARE LAW, TO EFFECT THE CONVERSION OF THE MINORITY-HELD 14% COMMON STOCK OF SCHENLEY INTO THE RIGHT TO RECEIVE ONLY CASH AND REDEEMABLE GLEN ALDEN DEBENTURES.

The Voege plaintiffs contend that the so-called merger was not in fact a merger. It was not authorized by the provisions of Delaware's General Corporation Law applicable to Schenley, a corporation organized in 1933.

They contend that the merger was an unwarranted attempt, in violation of Delaware law, to make irredeemable common stock redeemable under th purported authority of the 1967-1968 amendments of the Delaware General Corporation Law (Senate Bill No. 123, Chapter 50, Delaware Laws of 1967, and §16, Chapter 186 of Delaware Laws of 1967, amending §251 of the Delaware General Corporation Law) that are inapplicable to Schenley's common stockholders since the amendatory statutes expressly provide (Section 393 of Senate Bill No. 123, and §33 of said Chapter 186) that:

> " All rights, privileges and immunities vested or accrued by and under any laws enacted prior to the adoption or amendment of this Chapter...shall not be impaired, diminished or affected by this Act. "

and the merger statutes in force in 1933 and in 1967, prior to such amendments, provided that merger agreements shall state only the "manner of converting the shares of each of the constituent corporations into shares" "of the consolidated corporation" or "of the corporation surviving ...the merger". (Section 251 of the Delaware General Corporation Law, and old Section 59 of the predecessor act in force in 1933.)

(Whether or not similar contentions may be made with respect to the merger provisions for the elimination of the Schenley preferred stock, is beyond the scope of this brief and will not be touched on further, since the law expressly provides that preferred stock may be made redeemable and in fact Schenley's preferred stock was redeemable by its terms and since the preferred stock issue was created in 1969, subsequent to these amendments.)

At page 39 of its November 17, 1969 Proxy Statement (T.Ex. 2 A1073), Schenley conceded that, by its Charter provisions: "The common stock has no redemption provisions."

It is well settled under Delaware law that even if the charter contained such provisions, they would be unenforceable by virtue of Delaware General Corporation Law provisions in effect in 1933 and thereafter as present Sections 151(b) and 160(a)3, in force in 1971.

Thus, in Starring v. American Hair and Felt Company, 1937, 21 Del. Ch. 380, 191 A.2d 887, affirmed Del. Sup. Ct. 21 Del. Ch. 431, 2 A.2d 249, the Delaware Courts held that by these provisions a Delaware corporation was inhibited from attempting to redeem its common stock although its certificate of incorporation contained a provision purporting to permit such redemption.

The New York Courts have held that where, at the time a corporation was formed, its (preferred) stock was not redeemable, a subsequent amendment to the corporation law authorizing corporations to "classify" or "reclassify" shares, and to issue redeemable preferred stock, could not be construed as authorizing the making of non-callable stock callable by majority shareholders' vote, and if so construed, the statute would violate the Federal Constitution as impairing obligation of contract and as divesting stockholders of vested interest in the corporation without due process of law, and would not be a proper exercise of the State's reserved power to repeal or change the corporation's charter.

In Breslav v. New York and Queens Electric Light and Power Co., 249 App. Div. 181, 291 N.Y. Supp. 932, aff'd 273 N.Y. 593 (1937), the Appellate Division stated:

> " Making non-callable stock callable is neither classification nor reclassification. It is the creation of a new right in favor

of the corporation and results in the destruction of an absolute ownership and the substitution of a defeasible ownership." (Emphasis supplied.)

That Court held further that:

" Again, assuming the authority to make the proposed change is implicit in the statute, we believe its exercise would contravene the provisions of the Federal Constitution. Under the...statute..the right to alter or repeal the charter of a corporation is reserved to the Legislature. ...any change or alteration the Legislature might make by direct act may be made by delegating to the corporation, or a majority or some other percentage of its stockholders, the power to do so. ...

However, this reserved power is not unlimited, and its exercise is subject to the restrictions and restraints imposed by the other provisions of the State and Federal Constitutions. Due process of law must be observed, and vested property rights and the obligation of contracts must not be destroyed or impaired. ...

...No case has been cited and none has been found holding that an amendment which converts non-callable into callable stock is valid. ... Queens Company was incorporated and the preferred stock issued prior (although plaintiff acquired her shares subsequently) to the enactment of the statute which defendants invoke. What is the nature and character of plaintiff's interest as the present holder of non-callable preferred stock? ... We believe it is a vested property right inherent in her ownership, by virtue of which she received a fixed right in the division of the profits and earnings of the Queens Company 'so long as it exists and of its effects when it is dissolved'. It has been said that such a right 'is an inviolable as is any right in property, and can no more be taken away or lessened against the will of the owner than can any other right'. Kent v. Quicksilver Mining Co., 78 N.Y. 159-179, 180. "

(Underscoring supplied.)

At p. 940 of 291 N.Y.S., the Court affirmed that the right of a stockholder to remain such so long as the company exists, is protected against any acts which "would result in impairing his contract with the corporation or taking his property without due process of law, or both".

The Court concluded, at p. 491, that:

> " Generally, when it is proposed to exchange new stock for old, a dissenting stockholder has the right to accept the new stock and remain a stockholder or retire and receive the value of his stock. Plaintiff has no such choice. She must get out of the corporation. The majority has so decreed. The statute does not vest the majority with any such power. To hold it does is to hold the majority enjoys a right tantamount to the sovereign right of eminent domain. Defendants are attempting, under the guise of classification or reclassification of preferred stock, to impair the obligation of plaintiff's contract with the corporation and to divest plaintiff of her present vested and permanent interest in the corporation. This we hold the statute does not authorize, and if it does, it is unconstitutional. "
>
> (Underscoring supplied.)

With respect to the contention that the stockholders' property rights are preserved because, as in the case of sovereign eminent domain, they have the right of judicial appraisal, the Breslav Court stated (p. 942):

> " The remedy of appraisal under Section 38, which the learned Special Term said was available to plaintiff, applies only if the amendment alters the preferential rights of outstanding shares. As heretofore indicated, the proposed amendment does not alter any preferential right running with the shares but destroys a vested property right. Defendants admit the remedy of appraisal is

not an adequate or even an available remedy if the proposed change is not authorized."
(Emphasis supplied.)

Under Delaware law, minority common stockholders of a Delaware corporation organized between 1933 and 1967, at least, which is a constituent corporation on a parent-subsidiary merger (except for the statutory exception provided for by §253, DCL), had a vested property right to a stock interest in the surviving corporation, as well as a constitutionally protected immunity against being eliminated as a "participant in the continuing enterprise" by the parent corporation. The stockholders who had such rights included both the stockholders of the constituent corporation whose existence was terminated by the merger as well as the stockholders of the constituent corporation that survives the merger and continues as the "same legal entity as it was before the transaction."(1)

In 1962, the Delaware Chancery Court in Stauffer v. Standard Brands, Inc., 178 A.2d 311 (affirmed by the Supreme Court in 187 A.2d 78), reiterated this proposition, stating, at 314:

> " Section 251 of Title 8, Delaware Code, provides for the consolidation or merger of domestic corporations to be accomplished by an agreement...which shall, among other things, prescribe the manner of converting the shares of each of the corporations into

(1) Vulcan Materials Company v. United States, 446 F.2d 690, 693 (1971).

shares or other securities of the resulting corporation...

It is to be observed from the provisions of Section(s) 251...that minority stockholders of corporations merging thereunder may not be summarily eliminated from the continuing enterprise, but are given the option of accepting securities in the surviving corporation... ...a majority stockholder may not under a §251...merger eliminate minority stockholders as participants in the continuing enterprise."

(Emphasis supplied.)

That the doctrine of Breslav is applicable to Delaware and Delaware corporations was declared in 1943 by the Third Circuit Court of Appeals in the opinion of Circuit Judge Biggs in Hottenstein v. York Ice Machinery Corporation, 136 F.2d 944. Judge Biggs ruled (at page 950):

"If the right is a vested right of property, protected by constitutional guarantees, the holder can be as little deprived of it by merger consolidation under Section 59[1] as by a reclassification under Section 26[2]. If the terms of the contract between the...stockholder and his corporation cannot be changed by any charter amendment the...stockholder is entitled to the protection of the contract clause, Section 10, Article 1 of the Federal Constitution."

Consequently, the novel Delaware rule that the provisions of the Delaware General Corporation Law are

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(1) Presently Section 251 of the Delaware General Corporation Law.

(2) Presently Section 242 of the Delaware General Corporation Law.

deemed to have independent legal significance (Orzeck v. Englehart, Del. Supr. 195 A.2d 375 (1963)) and that a result prohibited by action attempted under one section of the law (i.e. to an attempt to make common stock redeemable by action under §242, in view of the prohibitions of Sections 151(b) and 160(a)3) may be entirely permissible when accomplished through the authorization of another (the 1967 amendments to §251) is subject to the caveat pronounced by Judge Biggs in Hottenstein that if "the right is a vested right of property, protected by constitutional guarantees, the holder can be as little deprived of it by merger or consolidation" under the merger statute "as by reclassification" under the reclassification statute.

Plaintiffs submit that the January 2, 1968 amendment of §251 by Chapter 186 of the Laws of 1967, Delaware, does not apply to the Schenley common stockholders on constitutional grounds, as delineated above.

Plaintiffs submit further that these amendments do not apply where the common stockholders of the surviving corporation are sought to be eliminated for cash by a prohibited redemption of common stock.

From the time this amendment was adopted, it was uniformly understood to authorize the payment of cash by the acquiring or the surviving corporation to the stock-

holders of the constituent (acquired) corporation, whose existence was terminated by the merger, and whose assets, by the merger, vested in the survivor, requiring payment for such acquired assets to the stockholders of the merged constituent corporation either by stock in the surviving corporation or by cash or other property in lieu of stock in the surviving corporation. (See: "Corporate Freeze-Out Mergers", 28 Stanford Law Review, 487, at 489 and n. 7.)

The transaction may not realistically be viewed as involving the conversion of shares of a constituent corporation into shares of the surviving corporation where the constituent corporation and the surviving corporation are the same legal entity.

The plaintiffs contend that there is nothing in the cash consideration amendments to Section 251 which purports to authorize the conversion or elimination in exchange for cash or property of the common stock of Schenley, the surviving (constituent) corporation whose legal existence survives the merger, and whose assets have not been transferred to or vested in a new entity, so as to require the payment or delivery of a consideration to its stockholders.

Should the defendants contend that amended Section 251 may be construed as a grant of such authority, then such grant is void and illegal with respect to Schenley,

a 1933 corporation, under Hottenstein, Starring and Breslav.

Finally, plaintiffs rely on the provisions of the statutes amending Section 251 that:

> " All rights, privileges and immunities vested or accrued by and under any laws enacted prior to the adoption or amendment of this Act...shall not be impaired, diminished or affected by this Act. "(1)

The rights of the minority common stockholders of Schenley that were not to be so "impaired, diminished or affected" include those declared in 1962 by Stauffer, i.e. not to be "summarily eliminated from the continuing enterprise" by the majority stockholder in a parent-subsidiary merger under Section 251.

Relevant to the foregoing discussion is the holding in Bryan v. Block & Blevins Co., Inc., 490 F.2d 56 (5th Cir., 1974) aff'g 343 F.Supp. 1062 (N.D.Ga. 1972) cert. den. 42 L.Ed. 2d 72 (1974), that where the State statute (of Georgia) prohibits majority stockholders from eliminating minority stockholders by redemption of their stock, the cash-for-stock provision of that State's merger statute (identical with amended §251) may not be construed to authorize the merger of the corporation with a paper company formed by the majority in order to accomplish that

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(1) See: Erickson v. Winnebago Industries (D.C.Minn. 1972) 342 F.Supp. 1190, 1193.

result, in the absence of a "business purpose" for the merger.

The law of Delaware is in accord. See: Pennsylvania Mutual Fund, Inc. v. Todhunter International, Inc., Delaware Chancery Court, C.A. 4845, August 5, 1975, granting a temporary injunction against the effectuation of a cash freeze-out parent-subsidiary merger under §251 serving no business purpose of the subsidiary, whereby the less-than-90% parent sought to eliminate the more-than-10% minority for cash by the use of a paper corporation, wholly-owned by the parent, which was formed for that purpose. A copy of this opinion is appended hereto for the convenience of the Court.

Judge Owen's finding of a valid business purpose in the desire of Glen Alden to simplify its corporate structure "under changing business and credit conditions" is not established by the record from which it appears that the purpose was to enable Glen Alden to grab the Buckingham proceeds and 100% of the future earnings of Schenley which, after 3 years of effort by the new management, had then turned the corner. In any event, simplification of the corporate structure of Glen Alden is not a valid business purpose of Schenley.

B. DEFENDANTS VIOLATED RULE 10b-5 WHEN, BY FALSE REPRESENTATIONS AND NON-DISCLOSURES WITH RESPECT TO THE VALIDITY OF THE MERGER, THEY INDUCED THE MINORITY COMMON SHAREHOLDERS TO ENDORSE AND SURRENDER THEIR STOCK CERTIFICATES FOR CASH AND DEBENTURES.

A948

The Proxy Statement (page 2) represented that "upon the reorganization becoming effective...each outstanding share of Schenley Common Stock will be converted into $5.00 in cash and $30.00 principal amount" of Glen Alden Debentures (redeemable at any time at the option of Glen Alden), which redeemable Debentures are the equivalent of cash (Outwater v. Public Service Co. of New Jersey, 103 N.J.Eq. 461 (Ch. Div. 1928) aff'd 104 N.J.Eq. 490 (E.&A. 1929)).

At page 3, it represents that "the proposed reorganization will result in Glen Alden becoming the owner of all of the equity securities of Schenley".

At page 6, it is stated that on and after the Effective Date, "all holders of Schenley Common Stock... will be required to exchange their Schenley stock certificates in order to receive the cash and Debentures to which they are entitled".

By the merger agreement, annexed as Exhibit B to the Proxy Statement, it was represented (2.2) that on the Effective Date, "Each share of Schenley Common Stock outstanding and not held by Glen Alden or by Schenley as

Treasury Stock""shall be converted into $5.00 cash and $30.00 principal amount of Debentures."

At 2.3 of said Exhibit B, it is represented that "after the Effective Date, each holder of an outstanding certificate...representing shares of Schenley Common Stock ...shall surrender such certificate...to...(the 'Exchange Agent') and shall receive in exchange therefor the cash and...Debentures... Until so surrendered, each certificate theretofore representing shares of Schenley Common Stock...shall be deemed to represent the right to receive the cash...and Debentures...".

There was no disclosure of the matters set forth in Point I(A) or that the merger was invalid and ineffective to require the common shareholders to endorse and surrender their certificates in exchange for cash and Debentures, whereby they were lured, enticed and induced to accept a disguised tender offer.

Representations and non-disclosures similar to the foregoing have been held to be violative of Rule 10b-5 by Judge Brieant in Voege v. Swett, 72 Civ. 3574 (S.D.N.Y.), unreported memorandum dated March 30, 1973.

Judge Brieant there upheld the second cause of action which charged that where a merger is unauthorized by the law of the state of incorporation, it is a federal

securities act violation to use such a merger as a device to eliminate for a cash payment minority stockholders who held more than 5% of the stock[1], i.e. to induce the stockholders to endorse and send in the certificates for their shares in exchange for cash, thereby causing them to unwittingly "accept" a disguised purchase offer, by representations that the merger was authorized by law, and that upon the "effectiveness" of the merger (filing the merger agreement, as approved by the parent, with the Secretary of State), all shares of the corporation held by the minority have been converted into the right solely to receive the merger price in cash.

Defendants' motion to dismiss the second cause of action on the grounds that the merger was legal and that no federal claim was alleged, was overruled by Judge Brieant, who ruled that:

> " The second cause of action appears to state a claim under now familiar Rule 10b-5. Such a claim is specifically pleaded. ...Even if the Vermont Statute

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(1) Under the Vermont Business Corporation Act, T. 11, §1955 authorizes a short-form merger whereby minority shareholders of a subsidiary corporation may be eliminated for cash where the parent corporation holds at least 95% of the subsidiary. The merger in Voege v. Swett was proposed under the long-form merger provisions of T. 11, §1952, which provided for the converting of the shares of each merging corporation into "shares or other securities or obligations of the surviving corporation".

> be construed to require plaintiffs to accept cash or check in a §1951 (long form) merger, and to remit him to the exclusive remedy of a state appraisal pursuant to T. 11, V.S.A. §2004, this Court is not precluded from granting a federal remedy under the securities laws."

Judge Owen erred in failing to make any findings on this issue, and in dismissing the claims under the federal securities acts.

Point II

... SCHENLEY, IN 1971, AFTER THE SALE OF BUCKINGHAM, WAS AS, IF NOT MORE, VALUABLE THAN SCHENLEY, IN 1968, WITH BUCKINGHAM.

A1311

The Greenberg Affidavit (T.Ex. 6) established that Schenley's earnings (under Rosenstiel management) for the 12 months ended February 29, 1968, were $2.76 per (split) share and its book value was $36.40 per (split) share. He concluded that based on a comparison of price-earnings and price-book value ratios from 1963 to 1968 of selected leading companies in the liquor industry and special (plus) factors in the Schenley situation, a higher-than-average multiple of 20 times earnings and a multiple of 1.5 times book value for Schenley common were warranted and fair. He concluded that a price of at least $53.33-1/3 per Schenley common share in 1968 was fair and equitable.

A1475

The Schuman Affidavit (T.Ex. 49) represents (par. 4) that the opinion therein was based on public information as well as on non-public information supplied by Schenley's management. The non-public information included information as to Schenley's sales, inventory and accounting practices, and information relating to the liquor industry and Schenley's relative position in that industry. There is no reference in paragraph 4 that Mr. Schuman received any information relative to Schenley's future pros-

pects from Schenley's management, although, under the heading "Fairness of the Consideration", he states: (A 1483)

> " 12. In my opinion, a value of approximately $29 per share of Schenley Common Stock is fair and equitable to Schenley's shareholders. In arriving at my conclusion, I took into consideration the many traditional indicia of value, including present and historical market prices, and factors relating to earnings, including price-earnings ratios, as well as information relative to the company's future prospects, and data concerning the company's inventory and accounting practices, its product mix and brand strengths and weaknesses, as compared to other companies in the liquor industry. I also considered the factor of book value, including the ratio of book value to market prices at which Schenley stock has historically sold, and the factor of the annual income to be received by each Schenley shareholder in the proposed reorganization as compared with the amount presently received as dividends. "
>
> (Emphasis supplied.)

At paragraph 17, he states: (A 1485)

> " The consideration to be received by Schenley shareholders is, in my opinion, demonstrably fair and equitable in the light of Schenley's past and prospective earnings. "
>
> (Emphasis supplied.)

The balance of his affidavit, which was tracked by his trial testimony, discloses that his evaluation of Schenley's "future prospects" and "prospective earnings" was not based on information supplied by Schenley, but by his logical deductions or subjective reactions to past historical data and on hearsay.

The crux of Mr. Schuman's testimony that was apparently all-impressive to Judge Owen was his statement at TT. p. 703-4 that "Schenley was a worse company with Buckingham sold and the cash in it than it was when it owned Buckingham".

Obviously, the loss of Buckingham's $8,700,000 after-tax 1970 earnings and the replacement therefor of estimated $4,070,000 after-tax earnings on an assumed investment of the Buckingham cash would result in Schenley earning $4,630,000 less than it would have earned before the sale, regardless of how much Schenley's earnings from the retained assets of the company would have increased. The issue in the case is not: Was Schenley a poorer company in 1971 without Buckingham than it was in 1971 with Buckingham? but: Considering Glen Alden's obligation under its 1968 agreement to purchase all the outstanding common stock of Schenley at not less than $53.33-1/3 per share, was Schenley a poorer company in 1971, without Buckingham, than it was in 1968, with 52.66% of Buckingham?

It appears from the record that in evaluating Schenley's prospects in 1971, if Mr. Schuman had been supplied with the information, estimates and other data with respect thereto that was available to and relied upon by Schenley's top management, he would have arrived at the

same conclusion as did Mr. Riklis, the guiding genius of Schenley, when he publicly announced his opinion in March of 1971 (while Schuman was working on the case) that:

> " Next year, without Buckingham, Schenley will make as much as it made with Buckingham three years ago. " (TT. 112.) A235 (UF24, A110.9)

If Mr. Riklis should have been proven to be correct by the figures, then Schenley, without Buckingham, would make as much as it made with Buckingham in 1968 ("three years ago").

Of course, one man's guess is as good as another's, but Mr. Riklis's was more than a guess, by virtue of his insider position, and was proven correct by the record facts that plaintiffs were precluded from adequately establishing at the trial. These facts are contained in the proferred Exhibits 10, 11, 12, 12(a), 12(b), 17, 17(b), 20 and 21, and should have been considered by the Trial Court (p. 11 Cole Brief, 77-7126)

These exhibits would have established that (as Mr. Riklis apparently knew in March of 1971, two months before the merger agreement was signed) the full results of his new management's turn-around efforts for Schenley were not fully realized in 1970, and that the earnings of Schenley, without Buckingham, would, after that sale, grow in leaps and bounds for years thereafter, under the new, younger and more aggressive management -- a factor entirely disregarded by Schuman.

A948

Page 23 of the Proxy Statement (T.Ex. 1) shows Schenley's net income with 52.66% of Buckingham for fiscal 1966, 1967 and 1968, during the Rosenstiel regime, of $20,469,743 (1968), $22,725,868 (1967) and $16,793,876 (1968), for an average of approximately $20,000,000 per year, or $2.50 per share on the basis of approximately 8,000,000 shares of common stock.

Under the Riklis management, Schenley, with 52.66% of Buckingham, earned, from September 1, 1968 until December 31, 1969 (when the balance of Buckingham was acquired), an aggregate of $24,490,806, for an average of approximately $18,368,105 per year(1), or approximately $2.30 per share in real Schenley earnings on the basis of 8,000,000 common shares.

In 1970, with 100% of Buckingham, Schenley reported $27,182,579 of net income, with diluted earnings (the convertible preferred stock was issued in December 1969 and is included as if fully converted) of $2.64 per share.(2) (Contrary to Schuman's assertion that this increase re-

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(1) This is a computed figure since the Proxy Statement (p. 22) includes the pooling of 100% of Buckingham, acquired December 15, 1969, in stating Schenley's income for these years. The figures above are Schenley real income with 52.66% of Buckingham without retroactive pooling.

(2) On the basis of 10,274,019 diluted shares (p. 22, T.Ex. 1).

A948

sulted from the realization of the full effects of the cost improvement program in 1970, it appears that this 1970 increase resulted from the inclusion of 100% of Buckingham acquired in December of 1969. The real increase in Schenley's earnings without Buckingham was realized only in 1971 and subsequent years.)

If permitted, plaintiffs could have established the following record of Schenley's 1971 and subsequent years' earnings without Buckingham.

In 1971, Schenley's earnings were $25,012,000, made up of earnings for the first six months (with Buckingham) of $11,628,000 and for the last six months (without Buckingham) of $13,384,000, or $26,768,000 without Buckingham for 1971 annualized on the basis of the last six months of earnings, or (on a fully diluted basis) $2.61 per share, which is higher than Schenley's average earnings for 1966, 1967 and 1968 while Schenley's book value (on a fully diluted basis) was then $40.44 per share (p. 15, T.Ex. A948 1) compared to the 1968 book value of $36.40 per common share. Schenley's 1972 earnings without Buckingham came to $26,646,000, and the earnings reported for the 13 months ended January 13, 1974 were $31,534,000, or a 12-month average (for 1973) of $29,104,300. The average earnings for the 30 months after the Buckingham sale were $26,961,000 per year. (p. 11, Cole Brief 74-7126)

Using this $26,961,000 figure for 1971 for Schenley without Buckingham, instead of the figures used by Mr. Schuman at Exhibit A1503 8 of the Schuman Affidavit, we get (on Mr. Schuman's assumption):

$26,961,000	- Schenley's earnings 1971 et seq.
+ 4,070,000	- After-tax return on assumed investment of Buckingham's proceeds
$31,031,000	- Schenley 1971 income without Buckingham

with income per share (diluted) of $3.03 per share, substantially higher than Mr. Schuman's figure of $2.18 per share for 1971 and higher than Mr. Greenberg's figure of $2.76 per share for 1968, as well as higher than the figure of $2.50 per share, the 1966-1968 average for Schenley (with 52.66% of Buckingham).

If Schenley common in 1971 and thereafter is valued at $3.03 x 17.6 times earnings, in line with the price-earnings ratios set forth at Exhibit 10 to the Schuman Affidavit, in view of its growth, the resultant $53.33-1/3 per-share valuation is in accord with Glen Alden's obligation.

It thus appears that, on the Schuman assumption but including a realistic appraisal of Schenley's worth, giving due consideration to future prospects being completely realized that year, Schenley in 1971 without Buckingham was not a poorer company than was Schenley in 1968

with 52.66% of Buckingham.

Assuming that, instead of paying all the Buckingham proceeds ($114,000,000 after taxes plus Buckingham cash of $31,000,000 (TT. 154, 166-168)) A277, A289-291 to a single shareholder (Glen Alden), these sums were distributed pro rata, in accordance with Glen Alden's fiduciary obligations, to all stockholders ($145,000,000 net after taxes to 10,274,000 shares, fully diluted), we would get a payment on account of the minority's share of $14 per share, leaving a $39.33 balance due under Glen Alden's obligation. Schenley without the Buckingham cash, with an income of $26,961,000 or $2.62 per share on a fully diluted basis, would have sufficient value to cover the $39.33 balance due per share (15x earnings).

The final assumption is that $65,000,000 of the Buckingham proceeds would be used to redeem the preferred shares, and that the $80,000,000 (after-tax) balance would be distributed pro rata at $10 per share to all common stockholders (leaving $43.33-1/3 to be paid for the minority's common). On the basis of the 8,000,000 common shares, Schenley's $26,961,000 net income would represent earnings of $3.37 per share. Payment of the balance of $43.33-1/3 to the minority would represent a p/e ratio of 12.86x, which even Mr. Schuman would accept as a proper valuation.

The Trial Court erred in rejecting the third party beneficiary claim because of supposed changed circumstances.

Judge Lasker had ruled that Glen Alden would be estopped from contending that a lesser price (than $53-1/3 paid to Rosenstiel in 1968) was fair "on a showing that the present (1971) factual situation is substantially identical to that which existed in 1968". There was no adverse change in the business affairs of Schenley between 1968 and 1971, because of the Buckingham sale, whereby the potentiality of 1968 became the realization of 1971, beyond Riklis's 1968 expectations, as set forth at pages 33-34 above.

B. GLEN ALDEN'S MARCH 1968 AGREEMENT TO MAKE, WITHIN A REASONABLE TIME, AN OFFER TO PURCHASE ALL OTHER OUTSTANDING SHARES OF SCHENLEY COMMON STOCK AT NOT LESS THAN $53-1/3 PER SHARE IS APPLICABLE TO THE AUGUST 1968 TENDER OFFER AND TO THE RESULTING (1971) MERGER OFFER, AND SUCH AGREEMENT WAS VIABLE AND ENFORCEABLE IN 1971.

At page 8 of Glen Alden's August 8, 1968 Exchange Offer Prospectus (T.Ex. 3) A1172 to Schenley's common stockholders, Glen Alden conceded, with reference to its March 30, 1968 Stock Purchase Agreement with Rosenstiel and his associates (the "Sellers"), that:

> " The Stock Purchase Agreement provides that it is 'the intention of the parties' that all of the holders of Schenley Common Stock be afforded an opportunity to sell their shares of Schenley Common Stock for a total consideration comparable to, or more favorable than, the purchase price paid to the Sellers. To carry out this intention, Glen Alden, in the Stock Pur-

chase Agreement, agreed with and for the benefit of the Sellers to make or cause to be made, within a reasonable time, an offer to purchase all other outstanding shares of Schenley Common Stock from the holders thereof on terms not less favorable than the terms of a proposed offer set forth in the Stock Purchase Agreement. The offer specified in the Stock Purchase Agreement consisted of Glen Alden Debentures, cash and warrants and is different from the terms of the Exchange Offer made by this Prospectus. "

Judge Lasker's opinion stated, with respect to the common stockholders' third party beneficiary claims, that:

" Their theory that they are entitled to $53 to $54 per share as a third party beneficiary is of doubtful validity, since the Rosensteil-Glen Alden agreement of March 1968 merely stated that it was the intention of those parties that the holders of Schenley common would be afforded an opportunity to sell their shares at a comparable or more favorable price than the $53.33-1/3 paid Rosensteil (emphasis added). Such an opportunity was tendered the plaintiffs in 1968, and they rejected it. "

Judge Lasker completely overlooked the second sentence of the provisions quoted above from the Exchange Offer Prospectus.

Judge Owen, in his November 24, 1976 opinion, wholly adopted Judge Lasker's opinion, stating similarly:

" In order to avoid possible future litigation, arguably involving the claim that this was a sale solely for control by insiders, the agreement also provided that it was the intention of the parties that the other holders of Schenley common would be afforded an opportunity to sell their shares for a total

consideration comparable to or more favorable than that paid to the Rosensteil group. Certain plaintiffs herein contend that this established a third party beneficiary claim on behalf of all other stockholders which was still viable at the time of the merger over three years later... Obviously, no shareholder had a vested right to the same consideration as Mr. Rosenstiel ad infinitum. "
(Emphasis supplied.)

The Glen Alden agreement must be construed in the light of the surrounding circumstances, and its purpose and object, which was to safeguard Rosenstiel from claims that he had received an unlawful premium for sale of control, as Judge Owen found.

Accordingly, Rosenstiel inserted provisions that would be curative if he was sued, and also provisions that would be preventative by precluding the basis for suit. At page 7, T.Ex. 3 A1172, reference is made to the curative provisions, i.e. Glen Alden agreed to indemnify the Sellers against any claims arising from the transaction, the indemnity agreement to be secured by an escrow fund, and bank agreement, or indemnity bond in the amount of $10 million. The prophylactic provisions are those quoted above from page 8 of T.Ex. 3 A1172, the Exchange Offer Prospectus.

These prophylactic undertakings are required to be as broad as may be required to afford the safeguard they were intended to provide, and to apply to all transactions which may be the basis for an attack upon the premium.

Professor Brudney in 88 Harvard Law Review, at 330 et seq., establishes that in a two-step integrated merger, where the selling stockholder receives a premium for his stock and knowingly assists the acquiring company (by turning over the use of the target company's stockholder lists and proxy machinery) to acquire sufficient stock by tender offer to enable the acquring company to get control of the target company and, with the stock so acquired with the assistance of the selling stockholder, to effect a freeze-out merger of the remaining stockholders at a lesser price than that paid to the selling stockholder, the selling stockholder has been required by the cases (cited at note 69, 88 H.L.R. at p. 332) to share the premium obtained on the sale of control "when it is shown that the buyer wished to acquire 100 per cent of the enterprise and that the seller of control knowingly assisted him in his endeavor". Said note 69 states:

> " The cases have required sharing of the premium obtained on the sale of control when it is shown that the buyer wished to acquire 100 per cent of the enterprise, and that the seller of control knowingly assisted him in his endeavor. See, e.g. American Trust Co. v. California w. States Life Ins. Co., 15 Cal. 2d 42, 62-64, 98 P.2d 497, 507-08 (1940); Brown v. Holbert, 271 Cal. App. 2d 252, 76 Cal. Rptr. 781 (1969); Commonwealth Title Ins. & Trust Co. v. Seltzer, 227 Pa. 410, 76 A. 77 (1910); Dunnett v. Arn, 71 F.2d 912 (10th Cir. 1934); But cf. Roby v. Dunnett, 88 F.2d 68 (10th Cir.) (proof of deception necessary), cert. denied, 301 U.S. 706 (1937). While the case seems to turn on the fact of the controlling shareholder's knowing assistance, the rights

> of the public stockholders are no less sacrificed when the buyer can achieve his goal by conversion in a forced merger rather than by deception with the seller's aid. "
> (Emphasis supplied.)

Here, the record shows that Glen Alden wished to acquire 100 per cent of Schenley (T.Ex. 3, TT. pp. A1172 A249/50 126-127) and that Rosenstiel was to be required to, and did knowingly assist Glen Alden in this endeavor (T.Exs. 64 and 75).

Here, by virtue of the merger effected solely by Glen Alden's vote of the Schenley stock acquired from Rosenstiel at a premium (14%) and the 62% of the Schenley common stock acquired on the tender with the knowing assistance of Rosenstiel (which assistance was paid for by the premium), the members of Schenley's common stockholder class were required to become forced sellers of their stock at less than the premium price paid to Rosenstiel. As cited above, he would be liable to share his premium with this common stockholder class because, as stated by this Court in Vine v. Beneficial Finance Co., Inc. (1967) 374 F.2d 627:

> " But appellee says, assuming that conclusion of the merger makes appellant a seller, any deception was in connection with the earlier stock acquisition from the ninety or ninety-five per cent of A stockholders, and that deception did not relate to the appellant, who did not sell at that time. This ignores the simple fact that appellant would never be in the position of a forced seller were it not for the fraud. "

Here, plaintiffs and the other common stockholders would never be in the position of a forced seller were it not for the required assistance given by Rosenstiel, for a premium, whereby Glen Alden acquired the stock which enabled it to compel the common stockholders to be forced sellers of their stock at $29 per share.

Accordingly, the common shareholders of Schenley who were frozen out by the merger would have a claim against Rosenstiel to account for his premium. Obviously, these common shareholders would have no claim if they likewise received the same premium price.

Since the intent of the prophylactic provisions was to preclude all claims that could be asserted against Rosenstiel for making "a sale solely for control by insiders" at a premium, whereby the remaining common stockholders would become forced sellers by a freeze-out merger, these provisions must be construed as embodying an agreement by Glen Alden that both its tender offer and consequent merger offer would be at not less than the $53-$54 price paid to Rosenstiel.

The "Offer to Purchase" made by the merger offer was made within a reasonable time.

The 1971 merger was not an unrelated and independent afterthought of Glen Alden's. It was an integral

part of the 1968 Exchange Offer and of the Stock Purchase Agreement (TT., pages 126-127). A249/50

Mr. Riklis testified that he was impeded from proceeding with the merger until Schenley's status had been clarified (TT., p. 130). A253 The first step required the 1969 mergers of Buckingham and BHM with Schenley in 1969 (TT., p. 132). A255 Then, after an appeal was lost in 1970 in the anti-trust suit which sought the divestiture of Buckingham by Schenley (TT., p.129), A252/3 a memorandum of agreement with Northwest Industries was signed in late 1970 (TT., p. 130). A253 Consummation required Justice Department approval of the proposed purchase, which was not forthcoming until January or February 1971 (TT., p. 130). A253

As Mr. Riklis also testified (TT., p. 132): A255/6

" Q. ...Did you say that you had to make a determination of what was going to happen to Buckingham before the Schenley-Glen Alden merger could take place?
A. Yes. Sometime in February (1971) when it was obvious that this thing is going on and be completed.....Mr. Becker and I sat together for the terms of the merger.
Q. At that time in February (1971) had you determined for sure that the Buckingham transaction was going to go through?
A. Yes. "

Glen Alden also had to await the Buckingham sale in May 1971 to provide funds for the merger from Schenley's coffers, after Schenley had acquired the balance (47.34%) of Buckingham from the holders thereof by the 1969 mergers

of Buckingham and BHM with Schenley (TT., pp. 130, 132). By this 1969 merger, the Buckingham minority were issued Schenley's $1.40 preferred shares which, [redacted] by the terms thereof, precluded a merger of Schenley from being effected, prior to March 1971 (p. 39, T.Ex. A1073 2).

Plaintiffs submit that they have conclusively established that the merger offer, made on May 21, 1971, was part of the "Offer to Purchase" which Glen Alden, on March 20, 1968, had agreed to make, to all other holders of Schenley common "within a reasonable time", and that such merger offer in fact was made within such reasonable time.

Point III

PLAINTIFFS ARE ENTITLED, UNDER F.R.C.P. RULE 54(c), TO A DECLARATION THAT AMENDED §251, D.C.L., INSOFAR AS IT PURPORTS TO EMPOWER GLEN ALDEN TO ELIMINATE, FOR CASH AND REDEEMABLE DEBENTURES BY A LONG-FORM MERGER, SCHENLEY'S MINORITY COMMON SHAREHOLDERS HOLDING MORE THAN 10% OF THE COMMON STOCK OF SCHENLEY, A DELAWARE CORPORATION ORGANIZED IN 1933, VIOLATED THE FEDERAL CONSTITUTION, AS SET FORTH IN POINT I(A) HEREOF, AND TO APPROPRIATE ADDITIONAL RELIEF RELEVANT TO SUCH DECLARATION.

Plaintiffs have demonstrated under Point I(A) hereof that the amendments to §251, D.C.L. (Section Sixteen, Chapter 186, Delaware Laws of 1967) are violative of the Federal Constitution insofar as they are sought to be invoked to empower Glen Alden to eliminate, by a long-form merger, the more-than-10% of the common stock of Schenley held by the minority stockholders of Schenley, a Delaware corporation formed in 1933, and to convert the irredeemable Schenley common stock held by these minority shareholders into cash and redeemable Debentures.

Pursuant to F.R.C.P. Rule 54(c), plaintiffs and the class are entitled upon this appeal to a declaration of such unconstitutionality, and to such appropriate relief as may be relevant to such declaration.

F.R.C.P. Rule 54(c) provides that "...every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party

has not demanded such relief in his pleadings".

Under this Rule, a party may be granted declaratory relief although such relief had not been demanded in the complaint. Dann v. Studebaker-Packard Corp. (1961, CA-6 Mich.) 288 F.2d 201.

It is well settled that such relief may be demanded at or after the trial or hearing or on appeal for the first time, without complaint amendment. Note: "Scope of Relief - Absence of Demand", 16 ALR Fed. 748, at 787 §5.

Point IV

IN ANY EVENT, VOEGE PLAINTIFFS' COUNSEL IS ENTITLED TO AN AWARD OF COMPENSATION FOR THE $8,000,000 INCREASE IN THE MERGER CONSIDERATION RESULTING FROM THE FILING OF THIS ACTION AND THE FILING OF THE PRELIMINARY INJUNCTION MOTION IN MARCH 1971.

In any event, the Voege plaintiffs are entitled, under the doctrine of Kahn v. Rosenstiel, 424 F.2d 161 (CA-3, 1970), to have the judgment appealed from amended pursuant to F.R.C.P. Rule 54(c) nunc pro tunc to reserve the jurisdiction of the Court to award, and to grant leave to such plaintiffs' counsel to apply for, compensation for the $8,000,000 increase in the minority stockholders' merger consideration made defensively in March 1971, after the filing of said plaintiffs' complaint and injunction motion.

As announced in February 1968, the proposed per-share merger terms were: $5 cash and a $30 7½% 15-year Glen Alden Debenture, (A 1339) The Voege action complaint and injunction motion were filed by March 8, 1968, (A 009) attacking the merger terms. The Voege plaintiffs contended that the 15-year Debenture had a valuation of 72% of principal value and that the value of the package was: $5 cash plus $21.60 in Debenture value, or $26.60 in the aggregate. (A 063)

Upon the filing of this complaint and motion, Schenley retained Allen & Co. to give ex post facto approv-

al to the terms, and to become architects of the defense to the motion and the action. Defensively to this action and motion, Mr. Schuman of Allen & Co. proposed that the maturity of the Debentures be shortened to 14 years, that the sinking fund terms be increased, and that the Debentures be acceptable at full principal value upon the exercise of Glen Alden stock warrants (A 1406)

Plaintiffs concede that by these modifications the Debentures had to be valued at 80% or $24 per Debenture, (A 1479/81) increasing the merger consideration per share from $26.60 to $29 per common share. On the basis of 3,400,000 fully diluted common shares held by the minority who were to receive the merger payments (the classes represented by the plaintiffs herein), the value of these payments was thus increased by $8,000,000.

Under the Kahn-Rosenstiel doctrine, where, upon an announced offer to stockholders, litigation ensues to enjoin the offer and, defensively to such litigation, the offer terms are increased by defendants, thereby creating a larger fund to be paid to stockholders, the plaintiffs bringing the litigation are entitled to an award of counsel fees for services rendered which resulted in the creation of this (additional) fund.

CONCLUSION

It is respectfully submitted, based on the foregoing: that the judgment appealed from should be reversed; that judgment of liability should be granted on all their claims in favor of the Voege plaintiffs-appellants; and that the case should be remanded for a determination of damages and/or other appropriate relief. In any event, the case should be remanded for amendment of the judgment appealed from, nunc pro tunc, so as to reserve to the District Court jurisdiction to award, and to grant to Voege plaintiffs' counsel leave to apply for, compensation for the benefits derived by the minority stockholders from the filing of the Voege action and the motion therein for preliminary injunction.

Dated: New York, New York
April 27, 1977.

Respectfully submitted.

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Attorney for the Voege Plaintiffs

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

WILLIAM MARVEL
VICE-CHANCELLOR

August 5, 1975

COURT HOUSE
WILMINGTON, DELAWARE

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REGISTER IN CHANCERY
WILMINGTON, DELAWARE

Hugh L. Corroon, Esquire
350 Delaware Trust Building
R. Franklin Balotti, Esquire
4072 duPont Building

Re: Pennsylvania Mutual Fund, Inc. v. Todhunter International, Inc., C.A. 4845, Submitted: August 4, 1975

Plaintiff seeks the granting of a temporary restraining order against the effectuation of a merger which plaintiff contends would, if permitted to be accomplished, constitute an unlawful freeze-out of plaintiff's interest as a stockholder of Todhunter International, Inc.

First of all, it is established law in Delaware and elsewhere that an injunctive order must be earned and will not issue merely because it will possibly do no harm. Here, however, I have some doubt as to whether or not the merger under attack has a valid business purpose. In other words, this is probably or possibly not a case in which a dissenting stockholder is merely entitled to an appraisal because of his unwillingness to continue in a changed business. Here there is to be no change in the business but merely an elimination of unwanted minority stockholders.

I feel therefore that there is some possibility on further argument and development of the case of a showing of illegality of

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RECORDER VOL ___ PAGE 1845

APPENDIX A

this plan by reason of it being a possible manipulation of corporate control for private purposes with no proper business purpose in mind I have doubt also as to whether or not a merger such as this may be accomplished under §251 with the facility available under §253. In the Schenley case the Court was involved with two operating companie and not with two shell companies. Use of control to freeze out or to manipulate a corporation to the detriment of minority stockholder has always been frowned on by this Court. Bennett v. Breuil Petroleum Corporation, 34 Delaware Ch., 6, Condec v. Lunkenheimer, 43 Delaware Ch. 353, and Schnell v. Chris Craft, Sup.Ct. /285 A.2d, 437.

Accordingly, I will enter a restraining order not enjoining the holding of a meeting in Florida tomorrow, but temporarily restraining the effectuation of the plan under attack.

WM/ch

c: Register in Chancery

BEST COPY AVAILABLE

STATE OF NEW YORK : COUNTY OF NEW YORK

CHARLES TRYNIN, being duly sworn, deposes and says that deponent is the attorney for plaintiffs-appellants Harry W. Voege and Anna May Tunmore, as Trustees, is over 18 years of age, resides at 2 Fifth Avenue, New York, New York 10011, and is not a party to this action.

That on the 26th day of April, 1977, deponent made due service of (a) two copies of the annexed Brief of Plaintiffs-Appellants Harry W. Voege and Anna May Tunmore, as Trustees, and (b) one copy of the accompanying (Vol. 3 of the) Appendix of the plaintiffs-appellants, by personal delivery thereof to the following:

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Attorneys for Plaintiffs

Charles Tryznin
CHARLES TRYZNIN

Sworn to before me this
26th day of April, 1977.

Estelle M. Kalus
Notary Public

ESTELLE M. KALUS
NOTARY PUBLIC, State of New York
No. 31-2022187
Qualified in New York County
Commission Expires March 30, 1979